MBF HOLDINGS BHD A

v.

MBF PROPERTY SERVICES SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
ASMABI MOHAMAD JC
[CIVIL ACTION NO: S4-22-256-2006]
12 JULY 2012

CONTRACT: *Discharge - Agreement - Parties to debt settlement deed agreed creditor would acquire ownership of debtor's lands if debtor defaulted - Debtor deposited with solicitors signed Memorandums of Transfer in creditor's favour - Transfer unable to be effected because of Registrar's Caveat on land entered by Inland Revenue Department - Whether debtor obliged to ensure lands were unencumbered - Whether debtor deliberately frustrated creditor's attempt to acquire lands* C D

The first defendant, which at all material times owned three pieces of land ('the Tebrau Lands'), was a wholly-owned subsidiary of the plaintiff until January 2003 when it was sold to another entity. The second defendant ('M & A'), a stockbroking company, entered into an agreement ('the agreement') with the plaintiff in July 2004 that the plaintiff would pay RM8 million to M & A in full and final settlement of its debts to M & A. An initial RM800,000 was paid upon execution of the agreement and the balance ('the balance sum') was to be settled within six months from the date of the agreement. The agreement provided that if the balance sum was not settled within that time-frame, M & A could either demand payment of the balance sum forthwith or acquire the Tebrau Lands *in lieu* of the balance sum. To give effect to the agreement the plaintiff deposited with the solicitors named in the agreement the duly executed Memorandums of Transfer of the Tebrau Lands from the first defendant to the plaintiff and from the latter to M & A. The plaintiff defaulted in paying the balance sum and M & A gave notice it was exercising its option to acquire the Tebrau Lands. The lands however could not be transferred to M & A because the Inland Revenue Department ('IRD') had caused a Registrar's Caveat to be lodged on the lands in late 2004 due to the first defendant's failure to settle arrears of taxes. The plaintiff filed the instant action for, *inter alia*, a declaration that it was no longer liable to pay M & A the balance sum as it had discharged its obligations under the agreement. The plaintiff contended that at the time it executed the Memorandum of E F G H I

A Transfer in favour of M & A, the Tebrau Lands were free of encumbrances and that by depositing the two Memorandums of Transfer with the named solicitors there was nothing else left for the plaintiff to do under the agreement. M & A, on the other hand, contended that because the plaintiff had failed to deliver up
B the Tebrau Lands unencumbered it had failed to discharge its obligations under the agreement and, therefore, the plaintiff's action should be dismissed.

Held (dismissing plaintiff's claim with costs):

C **(1)** To enable the Tebrau Lands to be acquired by the second defendant under the National Land Code, it was not sufficient for the plaintiff to merely execute the Memorandum of Transfer without also ensuring the lands were free from
D encumbrances to enable them to be transferred to the second defendant or its nominee. It was only upon registration of the Tebrau Lands in the name of the second defendant or its nominee that the plaintiff could be said to have discharged all its obligations under the agreement. (paras 33 & 35)

E **(2)** The Registrar's Caveat was lodged by the IRD due to the plaintiff's own default in not settling the arrears of taxes in respect of a company it owned. The plaintiff knew about the tax arrears and the Registrar's Caveat, yet pretended as if nothing had happened and misled M & A into believing the
F transfer and registration of the Tebrau Lands could be effected. (paras 36-38)

(3) It was obvious the plaintiff attempted to suppress the fact about the Registrar's Caveat to defeat M & A's attempt to
G exercise its right to acquire the Tebrau Lands. The plaintiff made no attempt to notify M & A about the caveat nor did it make any attempt to settle the IRD's arrears nor did it initiate any action to remove the Registrar's Caveat despite the plaintiff being the beneficial owner of the lands. The plaintiff
H could not be allowed to take advantage of the non-fulfilment of a condition the performance of which had been halted by it. (paras 38 & 39)

(4) The facts demonstrated the plaintiff's inequitable conduct and
I improper motive in seeking the declaration from the court. It was premature to seek the declaration in anticipation of a suit to be filed by M & A for being denied of the balance sum due to it. (paras 46 & 47)

Case(s) referred to:

Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd [2007] 6 CLJ 93 FC ***(refd)***

Alghussein Establishment v. Eton College [1988] 1 WLR 587 ***(refd)***

City of London v. Horner [1914] 111 LT 512 ***(refd)***

Everett v. Griffiths [1924] 1 KB 941 ***(refd)***

Lau Kee Ko & Anor v. Paw Ngi Siu [1973] 1 LNS 71 FC ***(refd)***

Lim Kim Cheong v. Johnson [1993] 1 SLR 313 ***(refd)***

New Zealand Shipping Co Ltd v. Societe Des Ateliers Et Chantiers De France [1919] AC 1 ***(refd)***

Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***

Redifussion (Hong Kong) Ltd v. AG of Hong Kong [1970] AC 1136 ***(refd)***

Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [1998] 4 CLJ 812 CA ***(refd)***

Su Wee Lip @ Philip Su v. Hj Lassim Abdul Rahman [2009] 1 MLJ 580 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

For the plaintiff - Prem Ramachandran (Jagdesh Singh & Divakaran Vasudevan with him); M/s Kumar Partnership

For the 2nd defendant - Denise Tan (Dhinesh Bhaskaran with him); M/s Shearn Delamore & Co

Reported by Ashok Kumar

JUDGMENT

Asmabi Mohamad JC:

Introduction

[1] By its amended summons and statement of claim dated 14 February 2012 ("ASOC") the plaintiff has sought three declarations. The first two declarations concerned the first defendant ("1st defendant") and the third declaration was against the second defendant ("2nd defendant"). The first was for a declaration that the 1st defendant has no right, title or interest in the lands known as Geran Mukim No. 253 Lot 50, Geran Mukim No. 254 Lot 51 and Lot 255 Lot 52 in the Mukim of Tebrau, District of Johor Bahru, State of Johor (collectively called the "Tebrau Lands"). The second was for a declaration for the 1st defendant to do all that was necessary and/or incumbent upon them to cause all relevant bodies including but not limited to the

Lembaga Hasil Dalam Negeri ("LHDN") to cause the removal or withdrawal of any caveats and or encumbrances lodged on the Tebrau Lands.

[2] The plaintiff's claim against the second defendant ("2nd defendant") was for a declaration that the plaintiff has discharged its obligations to the 2nd defendant pursuant to a M&A settlement agreement dated 12 July 2004 ("the agreement") and consequently was not liable to pay to the 2nd defendant the balance debt amounting to RM7.2 million under the agreement.

[3] The dispute between the plaintiff and the 1st defendant was resolved *vide* a consent judgment entered into between these two parties on 24 February 2012 whereby both the declarations sought against the 1st defendant were granted in favour of the plaintiff. The 1st defendant's counterclaim for a declaration that it was the alter ego of the plaintiff prior to 2003 and that the plaintiff was responsible for the outstanding tax liabilities to the LHDN was withdrawn on the same day the consent judgment was entered.

[4] The dispute between the plaintiff and the 2nd defendant proceeded by way of a full trial with one witness having testified on each side. After hearing the evidence of the plaintiff's witness ("PW1") and the defendant's witness ("DW1"), perusing the relevant documents referred to during the trial and upon hearing the submissions by the respective learned counsels I found that the plaintiff has failed to prove its case on the balance of probabilities. Hence I declined to grant the declaration sought and dismissed the plaintiff's case against the 2nd defendant with costs.

[5] The plaintiff being dissatisfied with the said decision appealed to the Court of Appeal against the whole of the said decision.

The Documents

[6] At the outset of the trial parties have agreed for the following documents (documents which were relevant between the plaintiff and 2nd defendant only) to be used:

Description	Document
i. Bundle of Pleadings	- "A"
ii. Common Agreed Document (B&C)	- "B"
iii. Statements of Agreed Facts	- "D"
iv. Issues To Be Tried	- "F"

The Issues To Be Tried

[7] For ease of reference the issues which were stated in document marked as "F" are reproduced as follows:

(a) Whether the plaintiff has discharged its obligations to the 2nd defendant under the M&A settlement agreement; and

(b) Whether the 2nd defendant, having elected to and exercised the option as provided in the M&A settlement agreement, is precluded from seeking to recover the balance monies from the plaintiff.

The Background Facts

[8] On 26 December 1996 the plaintiff and the 2nd defendant had entered into a marginal facility agreement whereby the 2nd defendant has agreed to finance the plaintiff for the acquisition of marketable securities listed on the Bursa Malaysia Securities Berhad (previously known as the Kuala Lumpur Stock Exchange) ("M&A Loan") (at p. 160 of document "B" – Recital F).

[9] On 23 June 1998 the plaintiff, 2nd defendant and a sister company of the 2nd defendant known as Insas Credit & Leasing Sdn Bhd ("Insas") had entered into a deed of settlement whereby it was agreed, amongst others, that a portion of the M&A Loan was deemed paid pursuant to the deed of settlement (at p. 160 of document "B" – Recital G).

[10] As there was a dispute between the plaintiff and the 2nd defendant under the deed of settlement, the plaintiff and the 2nd defendant entered into the agreement whereby the 2nd defendant agreed to accept a sum of RM8 million ("settlement sum") as full and final settlement of all monies payable by the plaintiff to the 2nd defendant (at pp. 159-169 of document "B"). Pursuant to the agreement parties had agreed for the differences to be resolved in the following terms:

(a) Upon the execution of the agreement, the plaintiff shall pay the 2nd defendant the sum of RM800,000 which was 10% of the settlement sum;

(b) Pursuant to cls. 2.2 & 2.3(i) and (ii) of the agreement both parties had agreed for the balance sum of RM7.2 million ("the balance sum") to be paid either by:

   (i) Payment of the balance sum within six months from 12 July 2004 which was the date of the execution of the agreement; or

A (ii) Payment of the balance sum from the proceeds of sale, if the plaintiff could secure a purchaser and formalise a sale and purchase agreement for the Tebrau Lands within six months from 12 July 2004.

B **[11]** In the event that neither of the events mentioned in sub-para. 10(b)(i) or (ii) above happen the 2nd defendant had the option to demand payment of the balance sum forthwith or to acquire the Tebrau Lands in lieu of the balance sum (cl. 2.6(a) and (b) and cl. 2.7 of the agreement at pp. 162 -163 of document C "B"). Clause 3.3 of the agreement provided for the plaintiff to indemnify the 2nd defendant for all damages arising from its acts or omission.

[12] Upon the execution of the agreement the plaintiff paid the D sum of RM800,000 as agreed. However the plaintiff had failed to pay the balance sum due to the 2nd defendant pursuant to the agreement. On 26 July 2005 the 2nd defendant issued a notice under cls. 2.6 and 2.7 to the plaintiff notifying the plaintiff of its intention to exercise its option to acquire the Tebrau Lands E (at p. 198 of document "B"). The 2nd defendant subsequently discovered that it could not acquire the Tebrau Lands and or register the same in its name or in the name of its nominee as there was a Registrar's Caveat lodged in respect of the Tebrau Lands *vide* Presentation No. 753/2004 dated 25 November 2004 F (at pp. 170-173 of document "B"). The Registrar's Caveat continues to be in force until this date. As result of the Registrar's Caveat having been lodged over the Tebrau Lands the 2nd defendant could not exercise its option under the agreement to transfer and or register the Tebrau Lands in its name and or in the name of its nominee. G

[13] The plaintiff commenced the ASOC against the 2nd defendant seeking for a declaration that it has discharged all its obligations to the 2nd defendant under the agreement and it was not liable to the 2nd defendant for the payment of the H balance sum of RM7.2 million.

The Case For The Plaintiff

[14] One Chong Siew Hoong ("PW1") who is currently the Vice I President of Finance of the plaintiff testified for the plaintiff. PW1 joined the plaintiff somewhere in September 2004. PW1 proceeded with her testimony by giving a little bit of history as to the relationship between the plaintiff and the 1st defendant and the events as well as the mechanics which led to the transfer and

the registration of the Tebrau Lands from the 1st defendant to the plaintiff. As the disputes between the plaintiff and the 1st defendant had been resolved *vide* the consent judgment entered on 24 February 2012, I would not delve into these facts but would focus on the facts which were relevant for the dispute between the plaintiff and the 2nd defendant *per se*.

[15] The 2nd defendant was and still is in the business of stock broking and its sister company, Insas was and still is in the business of money lending. Both the 2nd defendant and Insas provided share financing facility and loans to the plaintiff and its related companies. Insas and the 2nd defendant are related companies.

[16] There was a dispute between the plaintiff and the 2nd defendant pertaining to the plaintiff's indebtedness under the deed of settlement dated 23 June 1998 (refer to pp. 159-160 of document "B"). In order to resolve the dispute between these two parties on 12 July 2004 the plaintiff, the 2nd defendant and Insas entered into the agreement (refer Recital J of the agreement at p. 160 of document "B"). Amongst the salient terms which were agreed by the contracting parties were as stipulated in cls. 2.1 and 2.2 of the agreement (at p. 161 of document "B") and the gist of these clauses was as follows:

(a) The plaintiff to pay the sum of RM800,000 which was 10% of the RM8 million of the settlement sum to the 2nd defendant as the first instalment payment towards the settlement sum;

(b) Insas on the other hand was to execute a discharge of a charge in relation to the Tebrau Lands and deposit the discharge together with the original issue document of title with M/s Raslan Loong; and

(c) The plaintiff was to execute the Memorandum of Transfer of Tebrau Lands from the plaintiff to the 2nd defendant and to deposit the said Memorandum of Transfer with the same M/s Raslan Long.

[17] Clause 2.3 of the agreement (at p. 161 of document "B") provided that the plaintiff was to pay the balance sum within six months from the date of the execution of the agreement which was on 12 July 2004 or alternatively, in the event the plaintiff was able to secure a purchaser and formalise the sale agreement in respect of the Tebrau Lands not later than six months from 12 July 2004 the payment of the balance sum was to be made from the proceeds of the said sale.

[18] In an event of default on the part of the plaintiff to pay the balance sum to the 2nd defendant, the 2nd defendant had an absolute discretion to issue a written notice to the plaintiff to declare an event of default and opt for either firstly to notify the plaintiff that the balance sum shall become due and payable forthwith or secondly to elect to acquire the said Tebrau Lands in lieu of full settlement of the balance sum. Should the 2nd defendant elect for the second option it shall issue the plaintiff an absolute release and discharge of any of its obligations under the agreement (refer to cl. 2.6 of the agreement at pp. 162-163 of document "B").

[19] Pursuant to cl. 2.6 of the agreement the 2nd defendant shall exercise its option to acquire the Tebrau Lands upon a declaration by the 2nd defendant of a default on the part of the plaintiff. The 2nd defendant was required to give a notice in writing to the plaintiff of its intention to acquire the Tebrau Lands in full settlement of the balance sum due to the 2nd defendant. The 2nd defendant then shall be entitled to execute the memorandum of transfer as well as the discharge documents in its favour or in its nominee's favour for purposes of registration.

[20] Briefly pursuant to the agreement the plaintiff has an obligation to pay the settlement sum to the 2nd defendant as a final and full settlement of the claim by the 2nd defendant. The first upfront payment was for RM800,000 was to be paid upon the execution of the agreement and the balance sum was to be paid within six months from the date of the execution of the agreement (cl. 2.2(i) of the agreement at p. 161 of document "B"). Under cl. 2.7 of the agreement and in anticipation of the 2nd defendant exercising the option to acquire the Tebrau Lands in its favour the plaintiff had agreed to execute a memorandum of transfer over the Tebrau Lands in favour of the 2nd defendant. The said memorandum of transfer shall be deposited with M/s Raslan Loong (cl. 2.2(iii) at p. 160 of document "B").

[21] The plaintiff had in fact caused the RM800,000 upfront payment to be made to the 2nd defendant *vide* Malayan Banking cheque no. 468184 (at p. 129 of document "B"). In order to give effect to the agreement a memorandum of transfer was executed by the 1st defendant transferring ownership of the Tebrau Lands to the plaintiff (at pp. 130-141 of document "B"). In anticipation of an event of default and should the 2nd defendant opt for acquisition of the Tebrau Lands in lieu of settlement of the settlement sum the plaintiff had also signed a memorandum of tranfer (documented at pp. 142-152 of document "B").

[22] Up to 11 January 2005 the plaintiff had not paid the balance sum within six months as stipulated under the agreement. The 2nd defendant then issued of a letter dated 26 July 2005 (at p. 198 document "B") notifying the plaintiff of the non performance of its obligations under the agreement. In the same letter the 2nd defendant notified the plaintiff of its intention to elect to exercise the option to acquire the Tebrau Lands in lieu of the payment of the balance sum.

[23] On 18 May 2005 the 2nd defendant had written to the plaintiff informing the plaintiff that it had conducted a search on the Tebrau Land and found that a Registrar's Caveat had been lodged in respect of the said lands on 25 November 2004 *vide* Presentation No. 753/2004. The Registrar's Caveat was lodged due to some arrears owed by the 1st defendant to the LHDN. The plaintiff came to know of the Registrar's Caveat only on 18 May 2006. At the time the memorandum of transfer was executed in favour of the 2nd defendant the said Tebrau Lands were free from any encumbrances (at pp. 235-241 of document "B").

[24] The plaintiff claimed that it had done all that was possible pursuant to the agreement including the execution of the memorandum of transfer to effect the transfer of Tebrau Lands to the 2nd defendant. On the construction of the agreement the plaintiff's obligation was to pay the RM800,000 upon the execution of the agreement and then pay balance sum within six months from the date of the execution of the agreement. In the event the balance sum was not paid within the stipulated period there would be an event of default, in which case, the 2nd defendant could elect to either demand for the payment of the balance sum to be paid forthwith or exercise its option to acquire the Tebrau Lands. If the 2nd defendant opts to exercise the option to acquire the Tebrau Lands all that the plaintiff was required to do was to execute and deposit the memorandum of transfer of the 1st defendant and its memorandum of transfer of the Tebrau Lands with M/s Raslan Loong. It was the plaintiff's case that the 2nd defendant ought to have made the necessary searches with the relevant authority to ascertain the status of the Tebrau Lands before opting to exercise the second option to acquire the Tebrau Lands *in lieu* of payment of the balance sum.

[25] The plaintiff had paid the sum of RM800,000 upon the execution of the agreement. As the 2nd defendant had opted to acquire the Tebrau Lands the plaintiff had taken the necessary steps to deposit the two memorandum of transfer dated 12 April 2004 with M/s Raslan Loong. As such there was nothing else left for the plaintiff to do under the agreement. Based on this the plaintiff claimed that it had discharged all its obligations pursuant to the agreement and therefore was not liable for the payment of the balance sum to the 2nd defendant. Hence the plaintiff sought a declaration in terms of prayer (c) of para. 22 of the ASOC. The plaintiff has also claimed for interest, costs and any order this court deemed fit.

The Case For The Defence

[26] One Dato' Wong Gian Kui ("DW2") who was the director of the 2nd defendant testified for the 2nd defendant. On the whole DW1 confirmed the facts as narrated by PW1 in PW1's testimony pertaining to the existence of the margin facility agreement entered into between the plaintiff and the 2nd defendant (at p. 160 of document "B"- Recital F), the deed of settlement dated 23 June 1998 (at p. 160 of document "B"- Recital G) entered into between the plaintiff, the 2nd defendant and Insas and the settlement agreement dated 12 July 2004. DW2 repeated and reiterated the relevant clauses pertaining to the obligations between the plaintiff and the 2nd defendant as had been narrated earlier by PW1 in her testimony. I would not attempt to restate those facts herein for fear of duplicity and so as to save time. Suffice for me to state that both PW1 and DW1 were in agreement as regards to the relevant applicable clauses under the agreements.

[27] DW1 reiterated that the plaintiff had only paid the first instalment amounting to RM800,000 which was 10% of the total settlement sum of RM8 million upon the execution of the agreement. However till this date the plaintiff had not paid the 2nd defendant the balance sum despite notices having been sent to the plaintiff in accordance with the agreement.

[28] On 26 July 2005 the 2nd defendant through its then solicitors had given the notice to the plaintiff that as a result of the plaintiff's failure to pay the balance sum within the six months as stipulated in the agreement, the 2nd defendant was exercising its option to acquire the Tebrau Lands pursuant to cl. 2.7 of the

agreement (at pp. 198 and 200 of document "B"). The 2nd defendant had also informed the plaintiff that the necessary documents for purposes of the registration of the said lands were being prepared.

[29] By its letter dated 13 February 2006, the 2nd defendant had given notice to the plaintiff that it reserved its rights to commence an action against the plaintiff for the balance sum in the event the Tebrau Lands could not be transferred and or registered in the name of the 2nd defendant or its nominee (refer to pp. 205-210 of document "B"). As a follow up to that on 15 March 2006, the 2nd defendant's solicitors had requested the plaintiff to forward the relevant documents for purposes of effecting the transfer of the Tebrau Lands (refer to p. 232 of document "B"). Pursuant to its letters dated 18 April 2006 and 5 May 2006 respectively the plaintiff forwarded the relevant documents to the 2nd defendant to effect the transfer of the Tebrau Lands to the 2nd defendant (at pp. 233-234 of document "B").

[30] Despite the relevant documents having been executed the Tebrau Lands could not be transferred in favour of the 2nd defendant or its nominee as there was a Registrar's Caveat dated 25 November 2004 *vide* Presentation No. 753/2004 over the Tebrau Lands (at pp. 236-247). The Registrar's Caveat was discovered by the 2nd defendant on 8 May 2006 after it had conducted a search with the relevant authority (at pp. 236 to 243 of document "B"). On discovering that the said lands were subject to a Registrar's Caveat the 2nd defendant had written to the plaintiff to seek clarification pertaining to the status of the Tebrau Lands. At the same time a notice was given to the plaintiff that it shall bear all costs and charges incurred for purposes of the removal of the Registrar's Caveat. The 2nd defendant had also emphasised that in the event the said lands could not be transferred it reserved its rights to commence proceedings in court to recover the balance sum (see p. 235 of document "B").

[31] Based on the facts outlined by DW1, the 2nd defendant claimed that the plaintiff had failed to discharge its obligations pursuant to the agreement. The Tebrau Lands could not be transferred in the name of the 2nd defendant or its nominee till this date as a result of the plaintiff's own failure to transfer the said lands free from encumbrances. Due to the plaintiff's conduct the plaintiff was not entitled to the prayer sought.

A **The Findings Of The Court**

Whether The Plaintiff Had Discharged Its Obligation Pursuant To The Agreement

B **[32]** Based on the facts which I had outlined above the plaintiff claimed that it had discharged all its obligations to the 2nd defendant pursuant to the agreement. The facts before me disclosed that the plaintiff had only paid the sum of RM800,000 which was 10% of the settlement sum of RM800,000 leaving the balance sum of RM7.2 million to be paid pursuant to the C agreement. The facts also disclosed that the plaintiff made no attempts to pay the balance sum within the six months from the date of the execution of the agreement. The fact remains up to this date the balance sum remains due and unpaid.

D **[33]** The agreement provided the scheme on how the 2nd defendant was to exercise its obligations to recover the balance sum from the plaintiff in the event of default on the part of the plaintiff in complying with the terms of the agreement. From the facts adduced during the trial both testimonial and E documentary I am satisfied that the 2nd defendant had complied with all the terms stipulated under the agreement. However it was not able to transfer the said lands in its name and or in the name of its nominee as the said lands was subject to a Registrar's Caveat. Despite the fact that the plaintiff had executed the F relevant documents to facilitate the transfer of the lands to the 2nd defendant it had failed to deliver the said lands free from any encumbrances to enable the 2nd defendant to legally acquire the said lands pursuant to the provision of the National Land Code ("NLC") and discharge the plaintiff from its obligations pursuant G to the agreement. To enable the Tebrau Lands to be acquired by the 2nd defendant under the NLC it was not sufficient for the plaintiff to merely execute the memorandum of transfer without also ensuring that said lands were free from any encumbrances to enable the said lands to the 2nd defendant or its nominee.

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[34] The language used in cl. 2.6(b) and 2.7 of the agreement was "to acquire" the Tebrau Lands in lieu of full settlement of the balance sum. How could one expect the 2nd defendant to acquire the said lands when it could not legally effect the transfer of the I said lands in its name or in the name of its nominee. The plaintiff would not be able to be discharged from its obligations under the agreement if the said lands were not transferred in the name of the 2nd defendant and or its nominee in accordance with the NLC. Even PW1 herself admitted that before the plaintiff could

be discharged from all its obligations under the agreement the lands must be transferred and registered in the name of the 2nd defendant or its nominee.

[35] As the subject matter is land the meaning of the word "acquire" used in cl. 2.6 and 2.7 must be interpreted within the context and meaning of the NLC which meant that in order for the 2nd defendant to enjoy the fruit of its option the Tebrau Lands must be transferred and registered in the name of the 2nd defendant. It was misconceived for the learned counsel for the plaintiff to submit that it was merely a transaction of a passive nature to signify receiving of property and or that it did not cover the acts of registration pursuant to the NLC. The suggestion by the learned counsel for the plaintiff that the plaintiff's only duty was to execute the memorandum of transfer in favour of the 2nd defendant and nothing more was misconceived and unacceptable in view of the fact that the subject matter in this claim is land which is subject to the provisions of the NLC, the title of which could only be passed to the 2nd defendant upon registration pursuant to the NLC. In a nutshell to enable the 2nd defendant to acquire the said lands within the meaning of the NLC, the said lands must be transferred and registered in the name of the 2nd defendant or its nominee. It is upon the registration of the said lands to the 2nd defendant's name or the name of its nominee that the plaintiff could be said to have discharged all its obligations pursuant to the agreement. Hence the plaintiff has an obligation to ensure that the said lands were free from encumbrances.

[36] The Registrar's Caveat was lodged by LHDN on 25 November 2004 more than a year before the 26 July 2005 letter was issued by the 2nd defendant notifying its intention to acquire the Tebrau Lands in lieu of the full settlement of the balance sum. The Registrar's Caveat was entered by the LHDN due to the 1st defendant's default in settling its arrears of taxes to the LHDN for the years 1995 to 1997. The facts disclosed during the trial were that the 1st defendant was a wholly owned subsidiary of the plaintiff up to 27 January 2003. The 1st defendant was subsequently sold by the plaintiff to Binanamik Sdn Bhd ("Binanamik") *vide* a share sale agreement dated 27 January 2003 ("Share Sale Agreement") whereby the plaintiff herein had sold its entire share holding in the 1st defendant to Binanamik (see pp. 89-97 of document "B"). The Registrar's Caveat was lodged by the LHDN due the plaintiff's own default in not settling its arrears of taxes to the said LHDN for the years

A 1995 to 1997 respectively in respect of a company it owned. This fact was admitted by PW1 in her testimony (the evidence pertaining to the Registrar's Caveat and the surrounding facts and the position of the plaintiff *vis-a-vis* the 1st defendant were extracted extensively from PW1 through cross-examination by
B learned defence counsel for the 2nd defendant (see pp. 45/85 to 61/85 of the NP).

[37] It was in evidence that the 1st defendant was a wholly owned company of the plaintiff until 27 January 2003 (pp. 89-97
C of document "B"). It was expressly mentioned that the VENDOR in the share sale agreement, the plaintiff herein was the registered owner and or beneficial owner of all the issued shares of the 1st defendant. The arrears of LHDN taxes were as a result of the plaintiff's failure to pay the tax arrears to the LHDN. The
D information pertaining to the tax arrears were well within the knowledge of the plaintiff. This is evidenced from the letter dated 4 March 2005 (at p. 174 of document "B") and letter dated 2 August 2005 from Binanamik to the plaintiff (p. 260 of document "B"), a company which had purchased the
E 1st defendant from the plaintiff that a Registrar's Caveat was lodged in respect of the Tebrau Lands. The said 2 August 2005 letter mentioned of a meeting held on 21 July 2005 attended by Mr John Ding, who was an officer of the plaintiff who was involved in the execution of the agreement and acquainted with
F the facts surrounding the plaintiff's action in this court and one Mr Ong Hua Meng, who is currently the Assistant Vice President of the plaintiff. In the said meeting the issue pertaining to the problem faced by the 1st defendant due to the Registrar's Caveat was discussed (refer to item two of the letter at p. 260 of
G document "B"). In her testimony during cross-examination by the learned counsel for the 2nd defendant PW1 admitted that her answer that the plaintiff knew about the Registrar's Caveat on 18 May 2006 (in Q&A 40 of WSPW1) was false. During rigorous cross-examination PW1 admitted that the plaintiff had the
H information pertaining to the Registrar's Caveat as early as 21 July 2005.

[38] The facts pertaining to the Registrar's Caveat were within the plaintiff's knowledge. Despite having known about the
I Registrar's Caveat the plaintiff pretended as if nothing happened and misled the 2nd defendant into believing that the transfer and registration of the Tebrau Lands could be effected. The plaintiff even went ahead to supply the relevant documents requested by the 2nd defendant after the notice of default pursuant to cl. 2.6

and 2.7 of the agreement was issued. It was obvious to this court that the plaintiff being the vendor of all issued shares of the 1st defendant had attempted to suppress and or hide the fact about the Registrar's Caveat to defeat the 2nd defendant's attempt to exercise its right to acquire the Tebrau Lands in lieu of full settlement under the agreement. The plaintiff made no attempt to notify the 2nd defendant about this fact which would hinder and or frustrate the 2nd defendant's attempt to exercise its rights under the agreement. The plaintiff had made no attempt to pay the LHDN and or initiated any action to remove the Registrar's Caveat to facilitate the 2nd defendant's acquisition of the Tebrau Lands in lieu of settlement of its claim against the plaintiff despite the fact that the plaintiff is the beneficial owner of the Tebrau Lands. From my observation PW1 attempted to lie to this court about the fact that the plaintiff had come to know of the Registrar's Caveat only on 18 May 2006 despite the fact that there was glaring documentary evidence filed in court which proved otherwise.

[39] With the above background I am of the view that this court must not allow the plaintiff which was the defaulting party to obtain the order as prayed in its ASOC. It was without doubt that the 2nd defendant's option to acquire the Tebrau Lands was frustrated due to the plaintiff's own doing in not settling the outstanding taxes to the LHDN thereby resulting in the Registrar's Caveat to be entered in respect of the Tebrau Lands and or in not lifting the Registrar's Caveat so as to entitle the 2nd defendant to transfer the said lands free from encumbrances. Hence it could not be said that the plaintiff had satisfied its part of the deal. The plaintiff must not be allowed to take advantage of the non fulfilment of a condition the performance of which had been halted by it. This principle had been well illustrated in the Federal Court case of *Lau Kee Ko & Anor v. Paw Ngi Siu* [1973] 1 LNS 71; [1974] 1 MLJ 21 at p. 24 (case submitted by learned counsel for the 2nd defendant) where it was held that "it is a principle very well established that at common law, no person can take advantage of the non fulfilment of a condition the performance of which has been hindered by himself".

[40] The Court of Appeal in *Su Wee Lip @ Philip Su v. Hj Lassim Abdul Rahman* [2009] 1 MLJ 580 at p. 590 (also submitted by learned counsel for the 2nd defendant) had ruled that "... the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or

compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract ...". The same principle that a party ought not to be permitted to take advantage of his own breach was also discussed and accepted in *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577 and *Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd* [2007] 6 CLJ 93; *Alghussein Establishment v. Eton College* [1988] 1 WLR 587; *New Zealand Shipping Co Ltd v. Societe Des Ateliers Et Chantiers De France* [1919] AC 1.

Evaluation Of PW1's Testimony And Non Calling Of Mr John Ding

[41] PW1's evidence in examination-in-chief was so smooth sailing as it was prepared earlier by way of her witness statement as in WSPW1. Her testimony and credibility was tested by way of intensive cross-examination by learned counsel for the 2nd defendant. It was obvious that PW1 was not personally involved with the events leading to the execution of the agreement as she had admitted that she had joined the plaintiff after the event. PW1 had also admitted that her evidence was merely based on her perusal of the pleadings and the documents shown to her. When quizzed by learned counsel for the 2nd defendant, PW1 admitted that the person who would be able to enlighten this court on the whole transaction involving the plaintiff and the 2nd defendant would be her then immediate superior Mr John Ding, the President of the Corporate Section who had since left the plaintiff. According to PW1 Mr John Ding left the plaintiff in 2006, rejoined and again left the plaintiff. The court is left to wonder as to why such an important witness such as Mr John Ding was not called and or subpoenaed by the plaintiff to testify in the proceedings. I am of the view that Mr John Ding is a critical witness who would be able to shed some lights to support the plaintiff's claim that it had fulfilled its obligations pursuant to the agreement. He was the key person who was involved in the transaction. Mr John Ding was the person who had dealt with the 2nd defendant since 1990s until 2006. According to Binanamik's letter dated 2 August 2005 which I had mentioned earlier in this judgment Mr John Ding had also attended a meeting with Binanamik on 21 July 2005 where the issue of the Registrar's Caveat was deliberated. The plaintiff had not offered any reasonable explanation as to why its key witness was not called during the trial in support of its contention that the plaintiff had fulfilled all its obligations under the agreement. Neither could the

plaintiff explain to this court if attempts were made to try to locate Mr John Ding. The court is therefore left with no option but to invoke the provision of s. 114(g) of the Evidence Act 1950 against the plaintiff.

[42] As regards the evidence PW1's, PW1's evidence must be treated with caution as her testimony was tainted with hearsay evidence and inadmissible. PW1 admitted she was not the person directly involved in the said the transactions. PW1 did not have personal knowledge pertaining to the facts surrounding the transaction and or first-hand knowledge of what had actually transpired between the plaintiff and the 2nd defendant. In this situation PW1 would not be in a position to testify to the facts surrounding the agreement in support of the plaintiff's case.

Does The Principle Of Caveat Emptor Apply To The Facts Herein

[43] The principle of caveat emptor would not apply to the factual matrix of this case as this was not a sale and purchase agreement of the land *per se*. Instead it was an agreement for settlement of monies due from the plaintiff to the 2nd defendant for which the mode of settlement had been set out in detail in the agreement. Obviously the principle of caveat emptor relied by the plaintiff would not be applicable to the factual matrix of this case. Hence the authorities relied by learned counsel for the plaintiff in relation to the principle of caveat emptor would be of no assistance.

[44] The plaintiff could not rely on the principle of caveat emptor in this case to escape from its liability to settle the balance sum when the plaintiff itself was privy to the wrongdoings. The plaintiff could not be allowed to rely on this principle when the evidence disclosed during the trial clearly showed that the plaintiff despite having full knowledge of the Registrar's Caveat had deliberately attempted to suppress the information from the 2nd defendant. Further this issue was not pleaded by the plaintiff in its ASOC. It is a basic and cardinal principle in civil action that parties are bound by the four corners of their pleadings and are not permitted to raise issues not expressly pleaded. As the law on this point is so clear I would not delve into the law pertaining to pleadings. PW1 had also testified that the plaintiff was in no position to pay the balance sum to the 2nd defendant due to its financial constraint. PW1 had stated in cross-examination that the plaintiff had no intention to pay the 2nd defendant in cash (see Q&A 18 and Q&A 39-43 at p. 37/85 and pp. 44 & 45/85 of the notes of proceedings).

A *Estoppel/Equitable Remedy*

[45] By the plaintiff's conduct in not being transparent about the whole affairs it had indeed misled the 2nd defendant into believing that the transfer could be effected despite the fact that the
B plaintiff had full knowledge that the said lands was subject to the Registrar's Caveat. The 2nd defendant could not exercise its rights under the agreement due to the plaintiff's wrongful acts. No court would grant the prayer sought when the plaintiff had not come to this court with clean hands. The plaintiff was not entitled to raise
C estoppel as this was a discretionary equitable remedy which could only be invoked by a party if it had come to this court with clean hands. Based on the factual matrix of this case which I had highlighted in the preceding paragraphs it was not just and equitable for this court to grant the prayer sought by the plaintiff
D herein. Further the plaintiff could not rely on estoppel as the 2nd defendant did not have the full knowledge on the entire facts when it exercised the option to acquire the Tebrau Lands (for principle see *Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor* [2011] 1 CLJ 491). As far as the 2nd defendant was concerned
E at the time the agreement was executed the Tebrau Lands were free from any encumbrances and not subject to any caveat. It was on those terms that the 2nd defendant executed the agreement.

Whether The Relief Sought Ought To Be Granted

F **[46]** The relief sought by the plaintiff was a discretionary relief. A relief of this nature may be refused by the court upon settled principles. Generally the court would be reluctant to grant a declaratory judgment amongst other, under the following circumstances:

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(a) It is upon an issue of no practical consequence (*Lim Kim Cheong v. Johnson* [1993] 1 SLR 313);

(b) It may be premature to grant the declaration (*Redifussion (Hong*
H *Kong) Ltd v. AG of Hong Kong* [1970] AC 1136);

(c) The plaintiff has an improper motive in seeking a declaration (*Everett v. Griffiths* [1924] 1 KB 941);

(d) The plaintiff is guilty of inequitable conduct (*City of London v.*
I *Horner* [1914] 111 LT 512).

(see *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812)

[47] From the facts of this case I am of the view that it was premature for the plaintiff to raise this in anticipation of a suit to be filed by the 2nd defendant. The 2nd defendant which had been denied the balance sum due to it would have been the proper party to have come to the court to seek redress rather than the plaintiff. The issue raised by the plaintiff could have been raised in an event an action was filed by the 2nd defendant to claim for payment of the balance sum. It was obvious from the facts which had been illustrated above, by its conduct in suppressing the information pertaining to the Registrar's Caveat which was well within its own knowledge and due to its own making the plaintiff was a guilty party. Further the facts as set out above had also demonstrated the plaintiff's own inequitable conduct and improper motive in seeking the declaration from this court. No court would grant a remedy which is discretionary in nature if the plaintiff had come to this court under these circumstances.

[48] Further cl. 3.3 of the agreement had clearly provided that the plaintiff had agreed to indemnify the 2nd defendant for any damages suffered arising from its acts and or omission. Hence the plaintiff has a continuing obligation under the agreement.

Conclusion

[49] Based on the reasons stated above I am satisfied that the plaintiff had failed to discharge the burden of proving its case on the balance of probabilities as envisaged by the law. The plaintiff's prayer for a declaration that it has discharged all its obligations to the 2nd defendant under the agreement in terms of prayer (c) of the ASOC was therefore denied. Hence the plaintiff's claim was dismissed with costs.